No. ED101552

In the Missouri Court of Appeals
Eastern District

WILLIAM DAVID HILL,

Appellant,

v.

OLIVER "GLENN" BOYER,
SHERIFF OF JEFFERSON COUNTY, MISSOURI,

Respondent.

Appeal from the Jefferson County Circuit Court
The Honorable Timothy S. Miller, Associate Circuit Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a Jefferson County Circuit Court judgment denying Appellant's request for a permit to carry a concealed weapon. Appellant's Points I and II assert that the Missouri statute governing the issuance of such permits, § 571.101, RSMo, is unconstitutional in light of the August 5, 2014, amendment to Article I, § 23, of the Missouri Constitution. For the reasons set out in the argument section of Points I and II, this Court should decline to reverse any judgment of the trial court given that Appellant does not assert any error on the part of the trial court on those issues.

In the event that this Court should determine that review is appropriate, however, jurisdiction over Points I and II would lie with the Missouri Supreme Court. "When a real and substantial constitutional question is raised, this Court has jurisdiction to determine it." ***Mayes v. Saint Luke's Hosp. of Kansas City***, 430 S.W.3d 260, 270 (Mo. banc 2014); Mo. Const. art. V, § 3 ("The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity . . . of a statute or provision of the constitution of this state . . .") Respondent concedes that Appellant's constitutional questions are real and

substantial in light of the recent amendment[1], and jurisdiction on Points I and II therefore properly lies with the Missouri Supreme Court.

In Point III, Appellant asserts that the trial court erred in considering his prior felony conviction and denying his application based upon that conviction. This particular point does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. Therefore, jurisdiction on Point III lies in the Missouri Court of Appeals, Eastern District. Mo. Const. art. V, § 3.

In Point IV, Appellant asserts that the trial court erred in denying his application on grounds that § 571.101, RSMo, is unconstitutionally retrospective as applied to Appellant to the extent that it is a civil regulatory scheme that impairs Appellant's vested rights and imposes new disabilities on him relative to the restoration of his rights upon discharge from probation. While Respondent disputes the merit of these claims, they were properly raised before the trial court and the constitutional issue appears to be brought in good faith as an issue of first impression. ***Rodriguez v. Suzuki Motor Corp.***, 996

[1] While the constitutional claims may be "real and substantial", for the reasons set out in Respondent's Points I and II, this Court should decline to review them on the merits given that they were not addressed by the trial court.

S.W.2d 47, 52 (Mo. banc 1999); Mo. Const. art. V, § 3. Therefore, jurisdiction on Point IV properly lies with the Missouri Supreme Court.

STATEMENT OF FACTS

No material disagreement exists between Appellant and Respondent with regard to the underlying facts of this case.

Appellant William David Hill is a natural person and a resident of Jefferson County, Missouri. (LF 4, 12; Tr. 5). Respondent is a natural person and the duly elected Sheriff of Jefferson County, Missouri. (LF 9). On March 18, 2013, Appellant submitted to Respondent, in his official capacity, an application for a permit to carry a concealed firearm. (Resp. Ex. A; LF 1, 9, 11; Tr. 5). As part of his application, Appellant submitted a photographic copy of a certificate demonstrating Appellant's completion of a firearms safety training course. (LF 6; Tr. 10-11). On April 3, 2013, Respondent denied Appellant's application. (LF 6, 8, 10, 11; Tr. 12). According to Respondent, the application was denied because a background check on Appellant revealed the existence of a 1973 guilty plea to, and subsequent conviction of, felony forgery. (LF 6, 8, 10, 11; Tr. 12). Appellant does not contest the details of this conviction. (App. Br. 7).

On or about June 12, 1975, after successful completion of two (2) years of probation, Appellant was discharged from probation. (App. Br. Appx. 18-19). On July 28, 1975, the court recorded Appellant's release and discharge from probation and further restored to Appellant "all the rights and privileges of

citizenship, pursuant to the provisions of Section 549.111 (2) R S Mo. Supplement 1967." (App. Br. Appx. 18-19).

Subsequent to the denial of the permit by Respondent, Appellant sought judicial relief in the Small Claims Court and then in the Circuit Court of Jefferson County, Missouri on a trial de novo. (LF 1-3). Judgment was entered for Respondent, and this appeal followed.

ARGUMENT

POINTS I and II

This Court should decline to reverse the judgment and remand this case to the trial court based upon the alleged unconstitutionality of Section 571.101, RSMO, because the trial court did not commit any error.

Appellant's first two points on appeal revolve around the general theory that the newly amended language of Article I, Section 23, of the Missouri Constitution has rendered Section 571.101, RSMo, unconstitutional. Appellant concedes, however, that this issue was not raised before the trial court, which entered its judgment on April 29, 2014. (L.F. 11). Respondent recognizes that it would have been impossible for Appellant to have done so, given that the Constitutional Amendment was not passed until August of 2014. Nevertheless, Appellant's request should be denied as it is contrary to well-established authority, and Appellant has a perfectly viable alternative remedy in filing a new application for a concealed carry permit.

This Court should decline review of Appellant's Points I and II

Appellant asserts that this Court, or the Missouri Supreme Court, should overlook the fact that the trial court committed no error and reverse the trial court's judgment. This Court should decline to do so.

Section 512.160(1), RSMo, provides that "no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court." Furthermore, § 512.160(2) specifically directs that "[n]o appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action."

Using nearly identical language to Section 512.160(2), Missouri Supreme Court Rule 84.13 provides that "[n]o appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action."

The Missouri Supreme Court recently reiterated these longstanding principles:

> Absent some constitutional imperative . . . it simply is not the role of the court of appeals or this Court to grant relief on arguments that were not presented to or decided by the trial court. This rule abides regardless of the merits of the new argument. 'Appellate courts are merely courts of review for trial errors, and there can be no review of a matter which has not been presented to or expressly decided by the trial court.'

Barkley v. McKeever Enterprises, Inc., No. SC 94253, Slip op. at 8 (Mo. banc Feb. 24, 2015); ***Puzzanchera v. Loetel***, 293 S.W.3d 51, 62 (Mo. App. S.D. 2009) (""It is axiomatic that an appellate court will not convict the trial

court of error on an issue that was not put before it to decide."); ***Blanks v. Fluor Corp.***, 450 S.W.3d 308, 383 (Mo. App. E.D. 2014).

The cases cited by Appellant, ***State ex rel. Holland Indus., Inc. v. Div. of Transp.***, 762 S.W.2d 48 (Mo. App. W.D. 1988), ***State ex rel. Pfitzinger v. Wasson***, 676 S.W.2d 533 (Mo. App. W.D. 1984), are easily distinguishable. In both ***Holland*** and ***Pfitzinger*** the question was which version of a statute should an appellate court consider when reviewing a judgment from a trial court applying that statute. In the present case, however, Appellant is attempting to insert an entirely new constitutional claim into this case, wholly unrelated to the issues decided by the trial court. Given that the trial court was not asked to address these questions, and therefore committed no error, this Court should affirm the trial court's judgment.

POINT III

The trial court did not clearly err in entering its judgment denying Appellant's application for a concealed carry permit because Appellant was not eligible for such a permit under § 571.101, RSMo, in that the discharge of his probation does not serve to eliminate it for purposes of § 571.101.

Appellant's Point III includes his primary argument at the trial court level, and involves a simple question: What is the legal effect of his 1975 discharge from probation with regard to qualifying for a permit to carry a concealed weapon? (App. Br. Appx. 18-19). Appellant claims that the discharge should be interpreted to render him qualified for such a permit, and makes two novel legal assertions, both of which this Court must adopt in order to support this claim.

First, Appellant asserts that his discharge from probation under § 549.111, RSMo, is legally equivalent to a governor's pardon. (App. Br. 31-33). Second, Appellant asserts, relying on authority involving a governor's pardon rather than a discharge under § 549.111, that the discharge of his probation had the effect of obliterating his prior plea and conviction so completely as to render them irrelevant to the disqualification standards of Missouri's Concealed Carry statute, § 571.101, RSMo. (App. Br. 33-34).

Neither of these theories withstands scrutiny, nor is either supported by Missouri authority.

A. Standard of Review

"On review of a court-tried case, an appellate court will affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." ***Ivie v. Smith***, 439 S.W.3d 189, 198-99 (Mo. banc 2014) (citing ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. banc 1976)).

B. Relevant Facts

On June 12, 1973, Appellant entered a plea of guilty to, and was subsequently convicted of, felony forgery. (LF 6, 8, 10, 11; Tr. 12).

On or about June 12, 1975, after successful completion of two (2) years of probation, Appellant was discharged from probation. (App. Br. Appx. 18-19). On July 28, 1975, the court recorded Appellant's release and discharge from probation and further restored to Appellant "all the rights and privileges of citizenship, pursuant to the provisions of Section 549.111 (2) R S Mo. Supplement 1967." (App. Br. Appx. 18-19).

On April 3, 2013, Respondent denied Appellant's application for a concealed carry permit under § 571.101, RSMo, as a result of Appellant's felony forgery plea and conviction. (LF 6, 8, 10, 11; Tr. 12).

C. Discharge from probation under §549.111, is not legally equivalent to a governor's pardon.

Appellant's initial task in Point III is to convince this Court that his discharge from probation and restoration of rights under § 549.111 is legally equivalent to a governor's pardon under Article 4, § 7, of the Missouri Constitution. To do so, he relies almost entirely on a single sentence extracted from ***State ex rel. Oliver v. Hunt***, 247 S.W2d 969 (Mo. banc 1952), a voting rights case which considered whether the probation discharge statute[2] unconstitutionally encroached on the governor's power to pardon.

In ***Oliver***, the Missouri Supreme Court ultimately concluded that the provisions of the probation discharge statute did not improperly encroach on the pardon power, noting that the statute did not take any power from the governor. ***Id.*** at 973. The Court then went on to point out the difference between a legislatively permitted suspension of a sentence and the power to grant reprieves and pardons, noting that the two powers "are totally distinct and different in their origin and nature." ***Id***. The ***Oliver*** Court concluded that there is nothing in the Missouri Constitution which would "prohibit the

[2] The discharge statute at issue in ***Oliver*** was § 549.170, RSMo. That statute was the predecessor to § 549.111, RSMo, which is at issue in the present case. Section 549.111, RSMo, was repealed in 1977.

legislature from declaring a person whom the court has found to be worthy of parole and whom the court has finally discharged as completely reformed shall be restored to all rights of citizenship." ***Id***.

To the extent that Appellant is relying on ***Oliver*** to support his claim that probation discharges and pardons are identical, one might find the nature of ***Oliver*** case to be an odd fit. The ***Oliver*** opinion is essentially an explanation of the differences between pardons and probation discharges, not their similarities. This fact is perfectly illustrated by taking a more careful look at the sentence emphasized in Appellant's brief. (App. Br. 32). Somewhat tellingly, Appellant quotes an entire paragraph of the ***Oliver*** opinion, but ends his quotation by omitting the final sentence of that paragraph: "Both, to the extent each is operative, have the effect of a pardon. ***But this does not make them synonymous.***" ***Id***.

As much as Appellant might wish it were so, the ***Oliver*** opinion is not an explanation for why his discharge from probation under § 549.111 is identical to a pardon because it has "the effect of a pardon." To the contrary, the holding in ***Oliver*** is based upon the concept that a probation discharge is fundamentally different from a pardon, even if they have similar effects. The ***Oliver*** holding includes no discussion whatsoever on the topic of what differences might exist between the legal effects of probation discharges and

pardons because such an analysis was entirely unnecessary given the question before the Court.

"*Obiter dicta*, by definition, is a gratuitous opinion. Statements are obiter dicta if they are not essential to the court's decision of the issue before it." ***Swisher v. Swisher***, 124 S.W.3d 477, 482 (Mo. App. W.D. 2003). "While dicta can be persuasive when supported by logic, it is not precedent that is binding upon us." ***Id***. The ***Oliver*** Court's comment that a probation discharge has "the effect of a pardon" appears to have been a rhetorical flourish intended to emphasize a contrary point, rather than the result of any deeper legal analysis. It was entirely inessential to the holding, and lacked any supporting legal or logical foundation or explanation. Accordingly, that phrase, upon which Appellant's case rests, should be considered *dicta* and, thus, not binding precedent.

In fact, surprisingly little authority exists as to the question of the legal interaction between the now-repealed probation discharge statutes, which restored a convicted felon's rights and privileges of citizenship, and statutes which would disqualify an individual from some statutorily-enabled action. One is ***Oliver***, where the Court considered whether the legislature intended that felons discharged from probation under § 549.170 are eligible to vote. On this issue, the Court concluded that the legislature intended § 549.170 to constitute an express exception to the voter eligibility statutes. ***Oliver***, 247

S.W.2d at 973-974. The ***Oliver*** Court arrived at this conclusion in part because those voting statutes existed long before § 549.170 and were therefore superseded.

The only other case addressing this interaction of which Respondent is aware is ***Magruder v. Petre***, 690 S.W.2d 830, 832 (Mo. App. W.D. 1985). In ***Magruder***, just as in the present case, the plaintiff had been convicted of a felony, but had subsequently been discharged from probation under § 549.111. ***Id.*** at 831. In 1984 the plaintiff attempted to run for Sheriff, but was disqualified under § 57.010, RSMo, due to the prior felony. ***Id***. The plaintiff appealed and argued that when he was discharged from parole in May of 1968 he became eligible to hold the office of sheriff as a "right or privilege of citizenship". ***Id***. The question before the court in ***Magruder*** was thus nearly identical to the question before this Court.

The ***Magruder*** court concluded, just as the ***Oliver*** court had, that the later enacted statute, § 57.010 (adopted in 1945), should take precedence over § 549.111 (adopted, under different enumeration, in 1897):

> It is reasonable to suppose that the legislature intended by the enactment of the later statute to except from the rights and privileges of citizenship to which the convicted felon was restored upon discharge from bench parole the right or privilege to hold the office of county sheriff.

Magruder v. Petre, 690 S.W.2d at 832.

This common thread of reasoning, from ***Oliver*** to ***Magruder***, should also be applied in the present case. In this case, Appellant was discharged from probation with his rights restored under § 549.111, a statute effective, under various enumerations, between 1897 and 1977. The later-enacted statute here would be § 571.101 (enacted in 2003), which includes in subsection 2(3) a requirement that concealed carry permits only be issued to individuals who have "not pled guilty to or entered a plea of nolo contendere or been convicted of a crime punishable by imprisonment for a term exceeding one year . . ."

While no court has specifically examined the application of § 549.111 to this specific statute, it would be appropriate to apply the reasoning exercised by the ***Oliver*** and ***Magruder*** courts. Under this approach, this Court would assume that when the Missouri Legislature passed § 571.101 in 2003, it was aware of its prior (but by-then-repealed) statute, § 549.111. Had the Missouri legislature wished to make an exception in § 571.101(2)(3) for individuals such as Appellant whose rights had been restored after a plea and conviction, they could easily have done so. The language of § 571.101 makes it clear that they chose not to do so, and it is not this Court's prerogative to second-guess the wisdom of the legislature's choice. ***Pavlica v. Dir. of Revenue***, 71 S.W.3d 186, 190 (Mo. App. W.D 2002).

Appellant argues that ***Magruder*** is inapplicable first because it is *dicta*. While Respondent does not dispute that the court eventually did dismiss that case as moot given that the election had passed, the analysis was hardly gratuitous. ***Magruder***, 690 S.W.2d at 831. The ***Magruder*** court noted that they were faced with "a case which presents an issue—i.e., the eligibility of plaintiff to be county sheriff, or his ineligibility therefor on the basis of his prior felony conviction—which is of public interest and importance, and one which we would ordinarily decide and settle." It was because of this public interest and importance that the ***Magruder*** court made an effort to provide some guidance on the topic. The analysis was careful, reasoned, and supported by authority. To the extent that election timing issues might have rendered this analysis not strictly necessary to the eventual outcome of the case, it remains valuable as persuasive precedent.

Appellant next argues that ***Magruder*** should be disregarded because the "implied repeal principle presupposes that, at the time of controversy, both statutes are in existence." (App. Br. 36). Appellant seems to be suggesting that because § 549.111 was repealed in 1977, the 2003 passage of § 571.101 "cannot have impliedly repealed the rights restoration statute." This conclusion is logically perverse. In essence, Appellant is asserting that § 549.111 cannot be *impliedly* repealed because it had *actually* been repealed twenty-five years earlier. While this might be true in some technical sense, it hardly supports a

conclusion that legal results of the repealed statute are somehow more durable than if the statute had not been repealed. To suggest that the repeal of a statute somehow inoculates the effects of that statute against subsequent legislative action is unsupported by any authority of which Respondent is aware.

D. Any "obliteration" of his prior conviction under *Guastello* does not affect Appellant's disqualification under § 571.101

Even if this Court were to agree with Appellant and conclude the existence of a legal equivalence between probation discharges and pardons, Appellant's claim still fails. Appellant relies heavily on ***Guastello v. Dep't of Liquor Control***, 536 S.W.2d 21 (Mo. banc 1976), for the proposition that his conviction was "obliterated" as a result of his discharge from probation under § 549.111, and that he should not, therefore, be disqualified from obtaining a concealed carry permit. If this case were arising from the denial of Appellant's application for a liquor license he might have a point, but that is not the issue before this Court.

The liquor license statute at issue in the ***Guastello*** case, § 311.060(1), RSMo, provides that "no person shall be granted a license . . . who has been convicted . . . of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor." ***Id.*** at 22. As noted earlier, subsection 2(3) of the concealed carry statute includes a requirement that

concealed carry permits only be issued to individuals who have "not pled guilty to or entered a plea of nolo contendere or been convicted of a crime punishable by imprisonment for a term exceeding one year . . ." Section 571.101.2(3).

The difference between these two statutes is obvious. A liquor license applicant under the liquor control statute in ***Guastello*** is only disqualified based upon a **conviction**. A concealed carry applicant under § 571.101.2(3) is disqualified not only upon a conviction, but also if that individual **"pled guilty to"** a felony-level offense. This is a critical distinction:

> [I]f disqualification is based solely on the fact of conviction the eligibility of the offender is restored. On the other hand, if good character (requiring an absence of guilt) is a necessary qualification, the offender is not automatically once again qualified—merely as a result of the pardon.

Guastello, 536 S.W.2d at 23.

> The Missouri Supreme Court in ***Guastello*** has declared that guilt is not obliterated. In other words, the court in ***Guastello*** ruled that in some circumstances, an offender's conviction (pertaining to guilt as opposed to the mere conviction) could be considered and used in future determinations involving an offender.

State v. Bachman, 675 S.W.2d 41, 51 (Mo. App. W.D. 1984).

Appellant concedes that he entered a guilty plea to a disqualifying, felony-level charge. (App. Br. 7). Under the ***Guastello*** holding, even if the conviction that resulted from Appellant's charge had been "obliterated" by a pardon, his plea of guilt would survive, and serve as a disqualifying fact under § 571.101.2(3). Accordingly, Respondent properly denied Appellant's application, and the trial court's judgment should be affirmed.

POINT IV

The trial court did not clearly err in entering its judgment denying Appellant's application for a concealed carry permit because § 571.101, RSMo, is not unconstitutionally retrospective as applied to Appellant in that § 571.101 did not impair any vested right of Appellant, nor did it impose any new disability upon him.

Appellant asserts that the trial court erred in denying his application on grounds that § 571.101, RSMo, is unconstitutionally retrospective as applied to Appellant to the extent that it is a civil regulatory scheme that impairs Appellant's vested rights and imposes new disabilities on him relative to the restoration of his rights upon discharge from probation. While Respondent disputes the merit of these claims, they were properly raised before the trial court and the constitutional issue appears to be brought in good faith as an issue of first impression. ***Rodriguez v. Suzuki Motor Corp.***, 996 S.W.2d at 52. Therefore, jurisdiction on Point IV properly lies with the Missouri Supreme Court.

CONCLUSION

In Points I and II, Appellant asserts no claim of error on the part of the trial court, and those points should be dismissed.

With regard to Point III, the trial court did not clearly err in refusing to overturn the denial of Appellant's application for a concealed carry permit, and the trial court's judgment should be affirmed.

With regard to Point IV, this Court lacks jurisdiction over Appellant's assertion that § 571.101 is unconstitutionally retrospective. Point IV should, therefore, be transferred for determination by the Missouri Supreme Court.

Respectfully submitted,

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,308 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2013 software; and

2. That a true and correct copy of the attached brief was filed electronically on this 3rd day of April, 2015, with service to:

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